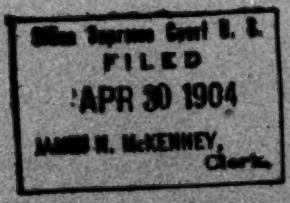
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 486 151.

MAGGIE A. BRADFORD

vs.

SOUTHERN RAILWAY CO.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

FRANK P. POSTON,
Attorney.

W. C. TOOF & CO., PPS. & LITHS. MEMPHIS

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 496

MAGGIE A. BRADFORD

vs.

SOUTHERN RAILWAY CO.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

The questions certified to this court by the Circuit Court of Appeals for the Sixth Circuit are as follows:

1. Does the Act of July 20, 1892, 27 Statutes at Large 272, providing when a plaintiff may sue as a poor person, apply to the prosecution of a writ of error from this court?

2. If that Act of Congress does not apply to appellate proceedings, has this court any authority to permit the prosecution of a writ of error, *in forma pauperis?*

We respectfully submit that both of these questions must be answered in the negative.

Section 11 of the Act of Congress approved March 3, 1891, 26 Statutes at Large 826, creating the Circuit Court of Appeals, and defining its jurisdiction, provides as follows:

"And all provisions of law now in force regulating the methods and system of review through appeals or writs of

error shall regulate the methods and system of appeals and writs of error provided for in this Act, and with respect to the Circuit Courts of Appeals, including all provisions for bonds, or other securities to be required and taken on such appeals and writs of error."

Section 1000 of the Revised Statutes is as follows:

"Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fails to make his plea good, shall answer all damages and costs where the writ is a supersedeas, and stays execution or all costs only where it is not a supersedeas, as aforesaid."

Rule 16, adopted by the Circuit Court of Appeals for the Sixth Circuit, provides that the plaintiff in error must deposit with the clerk, before the case is docketed, the sum of thirty dollars as taxable costs. It is claimed by the plaintiff in error that the right to prosecute a writ of error from the Circuit Court of Appeals is given by Chapter 209 of the Acts of Congress, approved July 20, 1892, which is as follows:

"That any citizen of the United States entitled to commence any suit or action in any court of the United States may commence and prosecute to a conclusion any such suit or action without being required to prepay fees or costs or give security therefor before or after bringing suit or action, upon filing in said court a statement, under oath, in writing, that because of his poverty he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action."

An appeal or writ of error is a statutory proceeding, and is not a common law right. The mere fact that the

appellant is a pauper does not, of itself, relieve him of the necessity of giving an appeal bond, and the general rule is that express statutory authority must be had for an appeal *in forma pauperis*.

The Presto, 93 Fed. 523.
McLain v. Williams, 43 L. R. A. 287.
Sullivan v. Haug, 10 L. R. A. 263.
Bailey v. Kincaid, 57 Hun. 516.
Butler v. Jarvis, 117 N. Y. 115.
Halloran v. Railroad Co., 40 Texas 465.
Fite v. Black, 85 Ga. 413.

In Sage v. Central Railroad Company, 96 U. S. 714, it was held "That there is no form for the allowance of an appeal, but there can be no appeal without the taking of security for costs, or costs and damages, and this must be done by the court, or judge, or justice."

In Ex-parte Parks, 93 U. S. p. 21, this court held:

"The regulation of the appellate power of this court was conferred upon Congress, and Congress having given an appeal or writ of error only in certain specified cases, the implication is irresistible that those errors and irregularities which can be reviewed only by appeal or writ of error can not be reviewed in this court in any other cases than those in which those processes are given."

In Woods v. Davidson, 57 Mississippi 206, the Supreme Court of Mississippi held, under a statute of that State similar to the Act of Congress, that a litigant who has commenced a suit *in forma pauperis* in a justice's court, can not appeal without bond from an adverse decision, basing this ruling upon the proposition that the right to appeal is statutory, and not a common law one, and that he is deprived of no constitutional right, because he has had his day in court.

The fact of poverty, itself, does not relieve appellant from the necessity of giving bond, but there must be express statutory authority for an appeal *in forma pauperis*. This is shown by the fact that practically every State in the United States has enacted such a statute.

The Act of July 20, 1892, does not authorize an appeal to or a writ of error from the Circuit Court of Appeals after an adverse decision by a court of original jurisdiction without giving security for costs. That Act provides, "Any person entitled to commence an action may commence and prosecute to a conclusion, any such action." A conclusion is reached when an adverse decision is had in the court of original jurisdiction, and hence the purpose of the statute is met when a party has had a fair trial in that court, and has met with an adverse decision. If he desires to pursue the action to a higher court, it must be done either under a statutory authority allowing the pauper's oath to be taken, or else he must give security for the costs.

The act under examination simply authorizes the prosecution of this case in the lower court, and does not, except by implication, authorize an appeal on the pauper's oath to the Court of Appeals. The writ of error is, in legal effect, a new action, and to prosecute it under the pauper's oath express legislative authority must be had.

If the act under consideration had been intended by Congress to give the right of appeal *in forma pauperis*, how easy it would have been to insert the necessary language in the act, and thus give express authority, and remove all question of doubt, and unless Congress gave this right of appeal, as stated in Ex-parte Parks, *supra*, "the implication is irresistible that only such cases as are ex-

pressly provided for by law can be brought up *in forma pauperis*," and unless this process is authorized by law, no such right exists, and the right can not be extended by implication to cases other than those expressly provided for by the act in question.

In the case of The Presto, 93 Fed. 522, the United States Circuit Court of Appeals for the Fifth Circuit, held that the Act of July 20, 1892, did not give a party defeated in the court of original jurisdiction the right to a writ of error on a pauper's oath. At page 524 the court says:

"In our opinion the statute does not warrant the construction claimed, even if express statutory authority is not required to dispense with an appeal bond. We think that the object and purposes of the statute in question was to give a poor person, unable to advance costs, an opportunity to have his case inquired into by a responsible court, and we can not infer that it was the intention of Congress that, after the commencement and prosecution of the case through the court of original jurisdiction, the case could thereafter be carried through all the appellate courts without security for the costs and fees necessarily incurred."

In the case of Galloway v. Ft. Worth Bank, 186 U. S., p. 178, which involved an application for leave to prosecute a writ of error to a State court without giving security, as required by Section 1000 of the Revised Statutes, under the Act of Congress of July 20, 1892, this court held that that act had no application to proceedings in the Supreme Court. If the act in question has no application to proceedings in the Supreme Court of the United States, it is difficult to see how it has any application to proceedings in the Circuit Court of Appeals. Both are appellate courts simply, and the practice in the one is the same as it is in the other, and we can see no good reason why, if not applicable to proceedings in the Supreme

Court, the act in question should apply to the Courts of Appeals.

The plaintiff in this case has had the benefit of a day in court, has had a fair trial, and was denied a judgment. If she desires to prosecute the case further, she should be required to give a bond for the costs, unless she can show clear legislative authority for the granting of this writ of error on the pauper's oath.

As said by the Circuit Court of Appeals for the Fifth Circuit, in the case of The Presto, *supra*, "It would be a decided injustice to the adverse party to make him responsible for all costs in the court of original jurisdiction, and, thereafter, without the usual security, to give his opponent the right to carry him through the appellate courts."

It is a well known fact that the courts are at the present day crowded with damage suits of every imaginable description against railroads and other corporations. It is equally well known that more than 90 per cent of these cases are brought on the pauper's oath. Even if the defendant is successful in its defense of these cases, it is required, as a matter of law, to pay a proportion of the costs, that is, such costs as are incurred in its behalf.

It is not only a great injustice to the defendants in these cases, after successfully defending them, to have a part of the costs to pay, and to be dragged through the appellate courts, and additional costs imposed upon them, but it is equally a hardship upon the clerks and other officers of the court, who are compelled to perform their services without pay; and it is submitted, in view of these facts, that the right to a writ of error should not be granted in this case, unless the plaintiff can show clear and express legislative authority therefor.

II.

If the first question be answered in the negative, it follows, necessarily, that the second must be answered in the same way. As shown by the authorities above cited, the right of appeal, or the right to a writ of error, is statutory, and not a common law right, and if the appeal or writ of error is not authorized by statute, it does not exist at the common law.

FRANK P. POSTON,

W. A. HENDERSON,
Of Counsel.